Superior Court
of the
State of Delaware

Jan R. Jurden
Judge

New Castle County Courthouse
500 North King Street, Suite 10400
Wilmington, Delaware 19801-3733
Telephone (302) 255-0665

Date Submitted: April 4, 2007
Date Decided: April 19, 2007

Jeffrey S. Marlin, Esq.
Donald R. Kinsley, Esq.
Marks, O'Neill, O'Brien
& Courtney, P.C.
913 N. Market Street, Ste. 800
Wilmington, DE 19801

Danielle K. Yearick, Esquire
Tybout, Redfearn & Pell
750 South Madison Street, Ste 400
P.O. Box 2092
Wilmington, Delaware 19899-2092

Robert D. Goldberg, Esquire
Biggs and Battaglia
921 North Orange Street
P.O. Box 1489
Wilmington, DE 19899

RE: William Lovett, Carol Lovett, The Estate of Christopher Lovett v. Andrew Chenney, Donald M. Durkin Contracting, Inc., and Matt Slap Suburu, Inc.
C.A. No. 05C-12-006-JRJ
***Upon Defendant Durkin's Motion for Reargument* – DENIED**

Dear Counsel:

Before the Court is the motion for reargument of Defendant, Donald M. Durkin Contracting, Inc. ("Durkin"). Durkin asks the Court to reconsider its March 2, 2007 decision, granting summary judgment to Defendants, Andrew Chenney and Matt Slap

Subaru, Inc. ("Matt Slap"). For the following reasons, Durkin's motion for reconsideration is **DENIED**.

PROCEDURAL HISTORY

In their motion for summary judgment, Chenney and Matt Slap argued that Plaintiffs, William Lovett, Carol Lovett, and the Estate of Christopher Lovett, could not maintain a tort action against them because Plaintiffs' remedies are limited to the Workers Compensation Act ("the Act").[1] Additionally, Chenney and Matt Slap argued that Durkin could not assert its counterclaims for indemnification and contribution. This Court agreed and granted Chenney and Matt Slap's motion for summary judgment. The Court held that there are no genuine issues of material fact with regard to whether Christopher Lovett and Andrew Chenney were acting within the course and scope of their employment with Matt Slap Subaru, Inc. ("Matt Slap") at the time of the accident. Durkin did not file a response to the motion for summary judgment, but joined Plaintiffs' response at oral argument.

DISCUSSION

A party may petition for reargument of a decision or opinion of the Court, but "[t]he Court will determine from the motion and answer whether reargument will be

[1] 19 *Del. C.* § 2304.

granted."[2] Generally, reargument will be denied unless the moving party can demonstrate that "the Court 'overlooked a precedent or legal principle that would have controlling effect, or that it has misapprehended the law or the facts such as would affect the outcome of the decision.'"[3] A motion for reargument should not be used for "raising new arguments or stringing out the length of time for making an argument."[4] A moving party has the burden of demonstrating "newly discovered evidence, a change in the law or manifest injustice."[5]

Durkin's motion for reargument is untimely and therefore inappropriate, because Durkin had an opportunity to raise the arguments it now asserts in response to the original motion for summary judgment. Durkin filed no response to the summary judgment motion, and now, by its motion for reargument, wants a second bite at the apple. Durkin has not established that the Court misapprehended the law or facts that would affect the outcome of the decision, nor has Durkin presented any newly discovered evidence. Durkin's motion for reargument merely rehashes the

---

[2]Super. Ct. Civ. R. 59(e).

[3]*Monsanto v. Aetna*, 1994 WL 46726, *2 (Del.Super.) (*quoting Wilshire Restaurant Group, Inc. v. Ramada, Inc.*, 1990 WL 237093, at *1 (Del. Ch.); *Miles, Inc. v. Cookson America, Inc.*, 677 A.2d 505, 506 (Del. Ch. 1995)).

[4]*Cummings v. Jimmy's Grille, Inc.*, 2000 WL 1211167, at *2 (Del. Super.)(*citing In re Murphy v. State Farm Ins. Co.*, 1997 WL 528252, at *1 (Del. Super.)).

[5]*Brenner v. Village Green, Inc.*, 2000 WL 972649, at *1 (Del. Super.)(*citing E.I. duPont de Nemours Co. v. Admiral Ins. Co.*, 711 A.2d 45, 55 (Del. Super. 1995)).

issues already considered in the motion for summary judgment. In addition to being untimely, Durkin's motion fails on the merits.

Durkin argues that genuine issues of material fact exist as to whether Chenney and Lovett were acting within the course and scope of their employment at the time of the accident. In support of its argument, Durkin submits the affidavit of Newark Police Sgt. Mark A. Farrall and the uniform traffic collision report (hereinafter referred to as the "police report"), prepared by Sgt. Farrall. Sgt. Farrall averred that he prepared the police report, which "accurately and truthfully records" the statements made by individuals that he interviewed.[6] As part of Sgt. Farrall's investigation of the accident, he interviewed several individuals, including Chenney, an eyewitness, Matt Slap employees, area residents, and Durkin employees. Although Sgt. Farrall was unable to reconstruct the accident due to lack of roadway evidence, Sgt. Farrall opined that the accident was caused by Chenney's excessive speed, water sheeting across the roadway, and minimal tire tread depth.[7]

In support of their motion for summary judgment, Chenney and Matt Slap submitted the affidavit of Matt Slap service manager John Pharis, who averred that at the time of the accident, Lovett and Chenney were road testing a vehicle as part of

---

[6]Mot. for Rearg., E-File 14077299, Ex. A, ¶ 4.

[7]Mot. for Rearg., E-File 14077299, Ex. A, at 22.

their job requirements. Durkin argues that Pharis' statements to Sgt. Farrall contradict his affidavit. In Pharis' affidavit, he stated that Old Paper Mill Road is not a significant deviation from the normal test route. Pharis told Sgt. Farrall, however, that he was not sure why Chenney and Lovett were on Old Papermill Road, because the general road test route is Papermill Road to Possum Park Road to Capitol Trail and back to the dealership. Pharis also averred that Chenney and Lovett were conducting a road test at the time of the accident, but Pharis told Sgt. Farrall that no record of a repair order for the vehicle was ever found. Finally, Durkin makes unsupported claims that Pharis' affidavit is deficient under Rule 56(e), which requires that an affiant is competent to testify, and his testimony is based on personal knowledge.

Durkin's claim that Pharis' affidavit and statements to Sgt. Farrall raise genuine issues of material fact regarding whether Chenney and Lovett were acting in the course and scope of their employment is not persuasive. Rule 56 not only requires that supporting and opposing affidavits must be based on personal knowledge and must demonstrate that the affiant is competent to testify, but the affidavit must also "set forth such facts as would be admissible in evidence."[8] The Court does not have to give effect to any portion of the affidavit that constitutes

[8]Super. Ct. Civ. R. 56(e).

inadmissible hearsay.[9] Durkins' claims that Pharis made contradictory statements about Chenney and Lovett's road test course are based on the police report. Any witness statements made to Sgt. Farrall that are recorded in the police report are inadmissible hearsay and should not be considered. Accordingly, Durkin has failed to satisfy its burden of proof that Pharis' statements and affidavit raise genuine issues of material fact.

Durkin also argues that there are facts in dispute as to whether Chenney's reckless operation of the vehicle took his actions outside the course and scope of his employment, and subject to an exception to the exclusivity rule of 19 *Del. C.* § 2304. Durkin maintains that the police report supports its claim that Chenney's operation of the vehicle constitutes "horseplay," and injuries that occur as a result of horseplay fall outside the scope of employment. Durkin's reliance on *Cave v. Perdue Farms*,[10] however, is misplaced. As this Court held recently in *Grabowski v. Mangler*,[11] only a claimant's horseplay removes his actions from the course and scope of his employment, and precludes the claimant from recovering for his resulting injuries

---

[9] *Wilson v. Pala Management Corp.*, 1988 WL 55310, *2 (Del. Super.) (*citing Woodcock v. Udell,* 97 A.2d 878 (Del. Super. 1953); Rule 56(e)).

[10] *Cave v. Perdue Farms, Inc.*, 1995 WL 562156 (Del. Super.).

[11] 2007 WL 121845, *2 (Del.Super.).

under the Act.[12] The claimant may recover for his injuries under the Act if another employee's horseplay caused the injury.[13] Moreover, 19 *Del. C.* § 2353(b), which Durkin also cites, does not preclude the claimant for recovering for the injuries caused from the actions of a co-worker, but specifically addresses when a claimant's behavior bars recovery under the Act. In this case, Lovett's actions are not at issue. Lovett was a passenger in a vehicle operated by Chenney. Durkin provides no evidence that Lovett's conduct contributed to the accident.

Although Durkin does not raise the issue, an exception to §2304 does exist when a claimant is injured by a co-worker's conduct. However, in that case, the claimant must establish the co-worker's specific, intentional conduct, and a deliberate intent to cause the injury.[14] There is no evidence that Chenney's operation of the vehicle rose to the level of an intentional tort, nor are there any facts in dispute that Chenney intended to injure Lovett. Moreover, Chenney and Matt Slap addressed this issue in their motion for summary judgment.

---

[12] *Id.* (*citing Seinsoth v. Rumsey Elec. Supply Co.,* 2001 WL 845661, at *1 (Del. Super.)).

[13] *Id.*

[14] *Rafferty v. Hartman Walsh Painting Co.*, 760 A.2d 157, 161 (Del. 2000)(*quoting* Larson, Worker's Compensation Law § 103.04)("A complaint, to survive a motion to dismiss, must do more than merely allege intentional injury as an exception to the general exclusiveness rule; it must allege facts that add up to a deliberate intent to bring about injury.").

CONCLUSION

For the aforementioned reasons, the motion for reargument of Defendant, Donald M. Durkin Contracting, Inc. is **DENIED**.

IT IS SO ORDERED.

Jan R. Jurden
Judge

cc: Original - Prothonotary